U.S. Department of Labor

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Issue Date: 20 January 2009

CASE NO.: 2005-SOX-00033

ARB CASE NO.: 06-010

In the Matter of

SCOTT BECHTEL,
Complainant,

v.

COMPETITIVE TECHNOLOGIES, INC.,
Respondent.

For the Complainant:

R. Scott Oswald, Esq.
Jason M. Zuckerman, Esq.

For the Respondent:

Mary E. Pivec, Esq.

DECISION AND ORDER ON REMAND

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. section 1514A ("the Act") enacted on July 30, 2002. Codified at 18 U.S.C. section 1514A et seq., the Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under section 806. Further, Congress has stated that the Act will be governed by 49 U.S.C. section 42121(b), which are the procedural regulations governing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. 18 U.S.C. 1514A(b)(2)(B).

Employees who "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [certain provisions of the Act], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders..." may bring a civil action to protect against retaliation for their actions. 18 U.S.C. section 1514A(a)(1). The Act extends such protection to employees of a company "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C.

section 78l)["SEA of 1934"] or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. section 78o(d))". 18 U.S.C. section 1514A(a).

The Act authorizes the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA") to investigate complaints and issue findings. Parties who disagree with OSHA's findings may request a hearing before the Office of Administrative Law Judges for the United States Department of Labor ("OALJ"). The Department of Labor has promulgated regulations that apply to its investigations of complaints of violations of the Act, found at 29 C.F.R. part 1980. Pursuant to 29 C.F.R. § 1980.107(a), the Rules of Practice and Procedure before OALJ apply to hearings on complaints under the Act. See, 19 C.F.R. part 18.

I. PROCEDURAL HISTORY

On September 23, 2003, Scott Bechtel ("Complainant") filed a complaint with OSHA, alleging that his employer, Competitive Technologies, Inc. ("Respondent; CTI") terminated his employment in violation of the Act. After OSHA dismissed his complaint, Complainant sought an appeal and hearing before OALJ. After many procedural actions, hearing in this matter commenced on May 17, 2005 in New Haven, Connecticut and concluded on May 20, 2005. By Decision and Order issued October 5, 2005[1], I dismissed Complainant's complaint. Complainant appealed to the Administrative Review Board ("ARB"), which found error in my application of the prevailing legal standard for cases under the Act. In its Decision and Order of March 26, 2008[2] the ARB remanded the case to me to apply the correct legal standards. The ARB denied Complainant's request for reconsideration of its Decision and Order.

Before I could address the ARB's remand, I was made aware that Complainant had filed a second complaint of discrimination under the Act against Respondent. The parties expressed interest in resolving that complaint and the instant complaint, and requested the appointment of a settlement judge. The cases were consolidated for that purpose, but the parties did not successfully resolve their dispute through the mediation process. The instant remand was returned to me, and by Order issued November 6, 2008, I invited the parties to file briefs on the ARB's remand. Claimant filed a brief on the date set for filing briefs, December 5, 2008. Respondent filed a brief on December 8, 2008. Because my Order directing the parties to file briefs was somewhat ambiguous in that it allowed thirty days, but did not specify that the time commenced with the issuance of the Order, I hereby admit Respondent's brief and consider it timely filed.

On December 24, 2008, Complainant filed a motion to strike in part Respondent's remand brief, asserting that Respondent erroneously attributed certain admissions to Complainant. Respondent has not responded to the motion, and I hereby grant it. I do note, however, that this Decision and Order relies for its factual findings upon the record in the case, and not the arguments of the parties.

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[1] In this Decision and Order on Remand, I shall refer to my initial Decision and Order by the designation "D&O of Oct. 5, 2005."
[2] In this Decision and Order on Remand, I shall refer to the ARB's Decision and Order by the designation "ARB Remand".

II. THE REMAND

A. ARB Stated Errors

The ARB found that I committed error by not holding Complainant to a burden of establishing that Complainant's protected activity was a contributing factor in the adverse action represented by his discharge. I compounded this problem by imposing a more stringent standard of proof upon Respondent's legal burden of articulating a legitimate business reason for its adverse action. I also failed to fully consider whether the stated reason was pretext for discrimination, or whether there was a dual motive for the adverse action.

The Board set forth the legal standards and shifting burdens of proof involved in the adjudication of cases under the Act, and noted that I committed error in three particular ways:

> (1) in places, the ALJ appears to have substituted creating an inference of discrimination for Bechtel's burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action;
>
> (2) the ALJ required CTI to prove by clear and convincing evidence that it had a legitimate non-discriminating reason for taking the unfavorable action; instead the statue requires that the respondent prove by clear and convincing evidence that it would have taken the same unfavorable action in the absence of protected activity; and
>
> (3) although CTI has a statutory defense to liability if it proves that it would have taken the same action in the absence of protected activity, the ALJ evidently determined that the defense would be lost if Bechtel were to prove that CTI's reasons were pretextual.

ARB Remand at 5.

The ARB concluded that I "should determine whether Bechtel established by a preponderance of the evidence that his protected activity was a contributing factor in CTI's decision to fire him. If Bechtel meets his burden of proof, the ALJ should then determine whether CTI established by clear and convincing evidence that it would have taken unfavorable action against Bechtel absent his protected activity..." ARB Remand at 7.

B. Undisturbed Findings

In its decision and Order of March 26, 2008, the ARB found no merit in the Complainant's stated grounds in support of his appeal and found that many of my factual findings were supported by the record. Although the ARB did not vacate my D&O of October 5, 2005, the case was remanded to me to correct erroneous standards of law that I had applied. The ARB stated that its "review is limited to an articulation of the correct burden of proof in a SOX case and to discussion of the manner in which the ALJ failed to apply those burdens". ARB Remand at page 3. The ARB did not vacate or remand for my consideration findings and conclusions that did not involve the application of the legal standard that I erroneously employed. I therefore conclude that the ARB upheld my findings regarding the following:

1. Dismissal of Allegations Relating to Post Employment Conduct

I concluded that Complainant's allegations relating to alleged negative references and statements made after he was discharged were not timely raised before OSHA and I dismissed those contentions. The ARB Remand does not address this finding, and I conclude that it stands undisturbed.

2. Dismissal of Allegations Regarding Insider Trading

I rejected Complainant's allegations that Respondent created a hostile work environment as the result of his complaints regarding alleged insider trading. I found that Complainant did not timely raise these allegations in his complaint with OSHA or during OSHA's investigation, either as discrete acts of alleged discrimination, or as part of a hostile work environment claim. Because Complainant couched his allegations in terms of hostile work environment, I first addressed that allegation, finding that Complainant had failed to establish that he was subjected to the type of atmosphere that has been determined to constitute a hostile work environment. Accordingly, I found that the allegation was of the nature that should have been raised as a discrete act of discrimination, and therefore was untimely filed. I further found that even if timely filed, Complainant failed to establish the reasonableness of his claim that he engaged in protected activity regarding complaints of alleged insider trading. I dismissed this claim for all of those reasons. The ARB did not address this finding in its D&O of March 26, 2008. Accordingly, I conclude that this finding remains intact.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND

A. Stipulations

The stipulations of the parties stated as stated in my D&O of October 5, 2005 are adopted and incorporated herein.

B. Testimony

The summaries of the testimony of the witnesses who appeared at the hearing before me as stated in my D&O of October 5, 2005 are adopted and incorporated herein.

C. Documentary Evidence

The documentary evidence admitted to the record and summarized in my D&O of October 6, 2006 is adopted and incorporated herein.

D. Statement of the Law

Pursuant to the ARB's Order of Remand, I find it appropriate to restate the legal standards applicable to the instant adjudication, and I hereby adopt the standard as stated by the ARB in its Order of Remand of March 26, 2008, pages 3 through 5. The Board wrote:

The Legal Standards

The employee protection provision of the SOX generally prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations. That provision states:

> (a) Whistleblower Protection For Employees Of Publicly Traded Companies. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission [*see*, ***e.g.***, 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements], or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-
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> (A) a Federal regulatory or law enforcement agency;
> (B) any Member of Congress or any committee of Congress; or
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission [*see*, ***e.g.***, 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements], or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. §1514A.

Complaints filed under the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005). 18 U.S.C.A. §1514A(b)(2)(C). To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Platone v. FL Vi, Inc.,* ARB No. 04-154, AU No. 2003-SOX-027, slip op. at 14-16 (ARB Sept. 29, 2006); *Harvey v. Home Depot, US.A., Inc.,* ARB Nos. 04-114, 115; AU Nos. 2004-SOX-020, 36, slip op. at 9-10 (ARB June 2, 2006); *Getman v. Southwest Sec., Inc.,* ARB No. 04-059, AU No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005). *Cf* 29 C.F.R. §1980.104(b), 1980.109(a). *See* AIR 21, §42l21(a)-(b)(2)(B)(iii)-(iv). *See also Peck v. Safe Air Int'l, Inc. d/b/a Island Express,* ARB No. 02-028, AU No. 2001-AIIR-003, slip op. at 6-10 (ARB Jan. 30, 2004).

If the complainant establishes by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action, then the respondent can still avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Platone,* slip op. at 16; *Harvey,* slip op. at 10; *Getman,* slip op. at 8. *Cf §* 1980.104(c). *S'ee* 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv). *See also Peck,* slip op. at 10.

ARB Remand at pages 3 through 5.

It is significant to note that when a case is tried on the merits, it is not necessary to determine whether Complainant has established a prima facie case of discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 256 (1981). Instead, Complainant must prove the same elements as required for the prima facie case, with the exception that Complainant must prove them by a preponderance of the evidence and not by mere inference[3]. *Brune v. Horizon Air Indus., Inc.*, ARB Case No. 04-037, ALJ Case No. 2002-AIR-8 (ARB Jan. 31, 2006); *Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Until Complainant meets his burden of proof, Respondent need only articulate a legitimate business reason for its action. *Clemmons v. Ameristar Airways, Inc.*, ARB Case Nos. 05-048, 05-096 at 9, ALJ Case No. 2004-AIR-11 (ARB June 29, 2007). If such evidence is presented, then Complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination. *Burdine*, supra. at 253. A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. *Hicks*, supra. at 2752-56. The Employer must present clear and convincing evidence that there was a nondiscriminatory justification for the adverse employment action. See, *Yule v. Burns Int'l Security Service*, Case No. 1993-ERA-12 (Sec'y May 24, 1995).

The onus falls on Complainant to prove that the proffered legitimate reason is a pretext rather than the true reason for the challenged employment action. The proper focus of the inquiry is whether Complainant has shown that the reason for the adverse action was his

[3] The ARB Remand cites my misapplication of this standard.

protected safety complaints. *Pike v. Public Storage Companies Inc*., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). As the Supreme Court has observed, the rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); see also *Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001). However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." *Mitchell v. Link Trucking, Inc.,* ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

Complainant is not entitled to relief under the Act if Respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action absent protected activity by Complainant. Although the standard of "clear and convincing" evidence has not been defined with precision, courts have held that it requires a burden higher than "preponderance of the evidence" but lower than "beyond a reasonable doubt." *Peck v. Safe Air Int'l Inc*., ARB No. 02-028, ALJ No. 2001-AIR-3 (Jan. 30, 2004).

E. Analysis

1. Findings Regarding Protected Activity and Adverse Action

Although the ARB faulted me for holding the parties to burdens of proof that were contrary to the prevailing legal standard, the ARB accepted my findings that Complainant engaged in protected activity when he raised issues regarding information that he believed should be disclosed in reports to the SEC, and also when he refused to sign disclosure reports. I found that Complainant engaged in protected activity when he:

- advised Respondent's Sarbanes Oxley Disclosure Committee (SOX Committee) that oral agreements should be disclosed in reports prepared for the SEC;
- advised the SOX Committee about the potential of litigation regarding allegations that Respondent's general counsel had engaged in malpractice;
- asked the SOX Committee meeting about whether Respondent needed to initiate litigation to enforce patent rights and whether such litigation needed to be reported to the SEC;
- questioned the SOX Committee about whether Respondent had the proper licenses to promote certain technologies.

I further found that Respondent had knowledge of the concerns he raised to the SOX Committee, and was aware that he refused to sign disclosure reports.

I found that Complainant was not subjected to adverse action under the Act when he was removed as an officer of CTI. I also found that Respondent did not engage in adverse action when it failed to conduct a review of Complainant's performance. I concluded that Respondent took adverse action against Complainant as defined by the Act and controlling regulations when it discharged him from his employment.

The ARB did not vacate any of these aforestated findings, or otherwise instruct me to alter the rationale for my findings or the legal standard that I applied when making these determinations. I therefore find that they remain intact, and I adopt those findings as stated in my initial D&O and incorporate them herein.

2. Respondent's Articulated Legitimate Business Reason for Adverse Action

Respondent maintains that Complainant's discharge was totally unrelated to any protected activity and was purely a response to its financial condition. It is undisputed that Respondent's financial condition was poor. CEO Nano credibly testified that he was hired primarily to generate income. From the time he assumed his position as Respondent's CEO, his focus was on bringing revenue to CTT. He proposed changes in the compensation plan in order to provide greater incentives to individuals who generated revenue. He urged employees to concentrate on producing sources of immediate revenue, rather than long range sources. He sought financing, and sold assets at discount to bring immediate revenue to the company.

The company employed about one dozen people, and Respondent used consultants for specific projects that were designed to produce revenue. Mr. Nano considered it Complainant's primary responsibility to generate revenue, and recalled one technology that Complainant had assured him would be manufactured and marketed to produce revenue before the end of calendar year 2002. Although Complainant had represented that the technology would generate a high level of income, Respondent realized a total of approximately $10,000 in retained earnings against costs of about $500,000.00.

Mr. Nano was critical of Complainant's suggestion that the company enforce patent rights because the legal costs associated with patent enforcement were high, and CTT already owed litigation counsel for actions that had failed to produce income. Mr. Nano also faulted Complainant for failing to secure customers to license technologies for which he was responsible. By the end of May, 2003, Respondent's financial circumstances had not significantly improved, and Mr. Nano forecast CTI's imminent bankruptcy. At a meeting before CTI's Board of Directors, Nano proposed three options for the company's financial future. The Board adopted a proposal that focused on reducing costs to keep the company afloat long enough to realize an influx of revenue expected from the resolution of litigation. The plan involved reducing operating expenses of approximately $100,000 per month by eliminating salaries and cash bonuses. Nano targeted Complainant for discharge because he was a highly paid employee whose contributions to the company's revenue pool were limited. Two other highly paid employees were either severed or removed from the payroll. Although Respondent had intended to discharge its accountant, she was retained because the company needed a financial officer to meet legal requirements imposed by regulation. The company's attorney was originally designated to fill that role as CFO, but he was placed on unpaid leave when Respondent was informed by the SEC in June, 2003 that some of his actions were under review. Tr. at 835.

To save costs, the company negotiated a reduction in its rent and reduced consulting costs. Meanwhile, in order to generate revenue, Nano sold the future value of expected litigation proceeds at a discount. The company relied upon consultants to produce revenue, which they successfully did. The company survived with these cutbacks until the litigation award proceeds were received in May, 2004. In the following year, Respondent recorded the highest amount of revenue in its history.

Company Director John Sabin recalled Mr. Nano's presentation to the Board, and confirmed that the Board had adopted a program designed to reduce overhead. The potential discharge of every employee was discussed. Mr. Sabin was familiar with Complainant's performance, and considered him ineffective at bringing revenue to the company.

Complainant admitted that Respondent had been advised by the SEC that its status as a publicly traded company was in jeopardy. He admitted that he did not deliver the projected revenues on technologies that he represented, and did not know if he produced any revenue on his projects during the period from September, 2002 until his discharge on June 30, 2003. Tr. at 582.

I find that the actions taken by Nano were designed to bring revenue to the company. The desperate need for cash is demonstrated by Nano's discounted sale of litigation proceeds that he knew Respondent would receive less than a year later. Although Complainant could not say whether he produced revenue during the time he worked under Nano, he admitted that he had not produced any new revenue as of December, 2002. Tr. at 371.

I find that Respondent has articulated that it had legitimate business reasons for discharging Complainant.

3. Protected Activities as Contributing Factors in Adverse Action[4]

The record is clear that Complainant refused to sign disclosure reports, and that Respondent needed his signature on those reports. Complainant also repeatedly raised issues concerning the need to report potential litigation, the need to disclose a change in the compensation plan, and whether Respondent could represent technologies without proper authorization. In June, 2003, Complainant made a presentation to CTI's Board concerning technologies that emphasized that he did not believe the company had the rights to represent certain technologies. Complainant also told Respondent's accountant that he was uncomfortable that the Board was unaware of CTI's status regarding ownership of those technologies, and he shared his discomfort about this issue with Respondent's CEO and others at a staff meeting.

Although I note that Respondent's CEO expressed frustration with Complainant's work performance, I find that the preponderance of the evidence fails to demonstrate that any of Complainant's protected activity contributed to Respondent's decision to terminate his employment. Despite Complainant's repeated complaints and efforts to insulate himself from the obligation to sign disclosure reports and participate in disclosure meetings, Respondent continued to require him to do so. His concerns were expressed over a period of months, and he suffered no adverse consequence. Despite his vocal concerns about the company's legal status regarding certain technologies, CEO Nano nevertheless authorized Complainant to travel to Korea to promote a project, and funded the development of the project.

[4] In the interests of clarity, I find it appropriate to re-state some of the text of my original Decision and Order in this section of the Decision and Order on Remand.

Complainant perceived himself threatened by Respondent's attorney in December 2002 when he refused to sign a disclosure statement. However, I find no relationship between that incident and his discharge in June, 2003. At the time of Complainant's discharge, the attorney was not on the company's payroll. I also find no relationship between Complainant's conversation with Mr. Levitsky about insider trading and Complainant's discharge. Although Mr. Levitsky purportedly acknowledged that Complainant could not be fired for reporting such activity, but could be fired for other reasons, there is no evidence that this conversation was considered when Complainant's employment was terminated months later. Similarly, I find no connection between Nano's threat that Complainant "would be out" if he reported insider trading to the SEC and his eventual discharge months later. I decline to find that these perceived threats predicted discriminatory animus that contributed to Complainant's discharge at a later date. Despite these threats and Complainant's complaints, Respondent continued to assign Complainant work, authorized him to represent the company, and expected him to review SEC disclosures.

I find that the preponderance of the evidence demonstrates no nexus between Complainant's protected activity and Respondent's adverse action against him. Even if I were to find so, in order to prevail, Complainant would need to show that the rationale offered by the Respondent was pretextual, and not the actual motivation for the adverse action. *Overall v. Tennessee Valley Auth.,* Case No. 1997-ERA-53 at 13. As the Supreme Court noted in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. See, also, *Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001).

Respondent maintains that Complainant's discharge was totally unrelated to any protected activity and was purely a response to its financial condition. Complainant argues that Respondent offered shifting rationales for its decision to terminate him, thereby demonstrating that its stated reason for his discharge is pretextual. Respondent initially cited Complainant's performance as its primary reason for his discharge. Subsequently, Respondent claimed that its decision was financially motivated. Complainant additionally argues that inconsistency between Respondent's demand for immediate revenue and the nature of its business supports finding pretext in its stated reasons for its adverse action. Respondent's own financial statements acknowledge its dependence on royalties from licensees over whom it has no control, and its involvement with technologies that produce long-term revenues. B-CX 99; 134.

As proof of pretext, Complainant contends that his job performance was good, as demonstrated by a $10,000.00 bonus authorized by Mr. Nano that was accompanied by a complimentary note from the CEO. He received positive feedback from Nano regarding the Fujikon license, and in December, 2002, shares of stock valued from $700.00 to $800.00 were placed in his retirement account in recognition of his contributions to CTI's success. Tr. at 118. A presentation made by Mr. Nano at the annual meeting of shareholders included slides that depicted a ceremony that took place in Korea, where the Aerielle Bug licensee and Complainant were acknowledged. Tr. at 119-120.

Complainant further asserts that pretext is demonstrated by Respondent's failure to follow its proposed "austerity plan", as Respondent did not realize the dollar for dollar savings that it projected by eliminating him. Complainant points to Respondent's addition of consultants who were then made employees within six (6) months of the adverse action as an indication that Respondent increased expenses in contradiction of its rationale for his termination. In addition, administrative employees were paid raises, which Complainant contends is inconsistent with a plan to cut operating costs. Complainant further argued that the projected savings that CTI would realize through his termination were not consistently stated in the company's written projections. Complainant also inferred that Nano's failure to keep his promise to conduct a review of Complainant's performance demonstrates that his termination for poor performance was pretextual.

I put little weight on the failure of Nano to conduct a performance review. There is no evidence that Complainant's salary or raises were contingent on such a review, and in fact, he received a bonus even though no performance review was conducted. Complainant has not alleged that he was denied promotion or that his salary was tied to such a review. I do not find the lack of a performance review of probative value in determining whether Respondent's action was pretextual.

I agree with Complainant that the record reflects that Respondent was committed to the development of Complainant's Aerielle technology, in which Respondent had heavily invested, and which Complainant had projected would produce a steady stream of income. However, I decline to infer that Nano's continued support of Complainant's efforts to bring this technology to market demonstrates that Nano approved of his efforts. Nano was undeniably disappointed that the technology was not manufactured and shipped for retail sale in time for the Christmas shopping season in late December 2002. The evidence of contemporaneously written emails shows that Nano expected to realize revenue from the product. Although he did not hold Complainant totally responsible for the manufacturing failure, his expectations of revenue were based in part upon Complainant's representations. Because Complainant had a relationship with the manufacturer and licensee, it is logical that Nano would have continued to support Complainant's work. However, Nano demonstrated his lack of full confidence in Complainant by assigning a marketing consultant to the project.

I also decline to find that because Complainant received a bonus and compliments about his performance, his subsequent dismissal was for pretextual reasons. Respondent's awards to Complainant for performance on specific projects is not indicative of the company's assessment of his overall performance. These actions are not inconsistent with Respondent's rationale for Complainant's discharge, and are consistent with Nano's philosophy of incentivizing performance. Complainant's employment was not terminated because of "poor performance" in the classic sense, but rather, Respondent concluded that his performance was not producing the short-term revenue that the company needed. The evidence is clear that the decision to discharge Complainant was made in direct reaction to the company's de-listed status, the potential for bankruptcy, and the Board's vote on cost-cutting measures. It is significant that the company's dire financial circumstances occurred well after Complainant's protected activity.

I do not find that Mr. Nano's emphasis on the generation of short-term revenue inconsistent with the purpose and general business goal stated by Respondent in its SEC reports. Respondent's business model also called for the company to seek new sources of revenue, while recognizing that development of new products involves risks. The record is undisputed that Nano continually urged Complainant and others to produce revenue, and it was not until the company was a few months away from bankruptcy that Complainant's employment was terminated. In the meantime, Respondent gave Complainant every opportunity to generate revenue, as demonstrated by its authorizing Complainant to represent the company in Korea just weeks before his discharge. Respondent also purchased a technology on Complainant's recommendation, spending $50,000.00 at a time when the company was short of cash. Mr. Nano expected Complainant to quickly recover the costs through licensing fees from this technology, but Complainant was unable to license the technology. B-CX 158.

Complainant testified that when he first came to CTI, Mr. Nano advised the employees that certain business models, such as investing in other companies, were not effective, and directed the employees "to focus primarily on licensing, patents, finding technologies, identifying market needs, and finding technologies that would match those". Tr. at 114. Complainant admitted that securing licenses was "a viable way to make money." Tr. at 114-115. Complainant was aware that Mr. Nano was focused on revenue production, but his testimony demonstrates that he did not adapt to Mr. Nano's shift of emphasis on generating revenue as quickly as possible. Instead Complainant continued to implement his regular method of doing business. With respect to the technology that Respondent bought upon his recommendation, Complainant testified:

Q: Did you convince Mr. Nano to expend $50,000 to purchase the rights to the Carlson technology?

A: Convince is an interesting word. I encouraged him. It was a property that was available because of the [omitted] bankruptcy and I encouraged him to take advantage of the opportunity and to make that investment.

Q: Did you tell Mr. Nano that you would be able to flip that opportunity quickly and produce licenses from companies like [omitted]?

A: No, I did not say that. I would not use the word flip like that.

Q: Did you tell Mr. Nano that you would be able to turn that investment around quickly and record licensing fees for CTI from the Carlson technology?

A: Can you define quickly in calendar terms or did you want me to try to do that. I am not sure what you mean by quickly.

Q: Within two to three months.

A: No.

Q: You never represented that to him?

A: No.

Q: You were aware that Mr. Nano was looking for short-term revenue production in the fall of 2002, were you not?

A: Define short-term.

Q: As quickly as it could come in the door.

A: In the fall of 2002, Mr. Nano was telling us that he was going to get investment and that he knew how to do that and that he was going to get investment capital in the company.

Q: Did he not also tell you that he needed you as the vice president of technology commercialization to produce revenue as quickly as possible?

A: Within two to three months in the fall, no I don't recall it being an issue.

Q: Did he tell you to produce it as quickly as possible?

A: I think that he wanted us to produce revenue as quickly as our business model would allow us to produce revenue.

B-CX 158. at pages 153-155.

The evidence on the whole demonstrates that Complainant disagreed with the direction that Mr. Nano was taking the company. He complained to Mr. Jacques about Mr. Nano's management decisions. He called Mr. Sabin and complained to him. Complainant did not agree with the CEO's decision not to spend money on patent enforcement litigation. B-CX 158, page 159-161. The evidence portrays Mr. Bechtel as an individual who was unwilling or unable to adapt to Mr. Nano's management style or decisions. I find that the record on the whole does not contradict Respondent's rationale for Complainant's termination, which is that Complainant's performance had not contributed to Respondent's need for short-term revenue. Complainant has failed to demonstrate that Respondent's rationale is pretextual.

I find that Respondent has established that its plan to cut immediate costs was designed to save money. Although Mr. McPike reported that the company was not losing money at the rate that had been projected, the evidence establishes that the company continued to lose money. Complainant recalled that Nano had advised employees that restructuring of the company might be necessary. Tr. at 567. It was de-listed from the stock exchange. The fact that Respondent's plan was more effective than anticipated does not demonstrate that it was pretextual. At its inception, the plan was designed to keep the company alive and out of bankruptcy until revenue could be realized. Because of cost cutting measures, including the immediate savings related to the salaries and personnel costs of three highly paid individuals, reduction of payables, the discounted sale of assets, an influx of financing, and the success of its consultants in generating short-term revenue, Respondent's financial situation improved more quickly than was first projected. As a result, the company was able to hire consultants as employees by December 2003.

This scenario is consistent with other periods when CTI experienced financial setbacks that required the layoff of employees, only to experience a rebound in fortune that allowed for additional personnel. I also accept as rational Mr. Nano's explanation that the raises Respondent gave to administrative staff boosted morale, and had little impact on the company's operating expenses. I do not find pretext in the Company's success in bringing in additional revenue and avoiding bankruptcy. Complainant was targeted for discharge because he was a highly paid individual who produced little immediate revenue for a company that desperately needed it. His failure to meet Respondent's expectations is fully supported by the record. Respondent's articulated rationale that Complainant's performance and the company's need for money are inter-related and reflect a legitimate business purpose.

The record reflects that Respondent would have terminated Complainant's employment regardless of his protected activities. Complainant repeatedly raised issues regarding SEC disclosures, and Respondent continued to solicit his opinions without terminating him. Respondent continued to give him work assignments and fostered his projects. Complainant has failed to demonstrate that Respondent's rationale is pretextual, and that he was discharged in retaliation for his protected activity.

I find that Complainant has not established that Respondent terminated his employment in violation of the Act.

F. Conclusion

The ARB did not address my conclusions regarding damages and Complainant's allegations regarding Respondent's alleged post-employment conduct. The ARB did not vacate my findings dismissing Complainant's allegations regarding insider trading and hostile work environment. Accordingly, the text of my original Decision and Order regarding those findings is adopted and incorporated herein.

ORDER

The relief sought by SCOTT BECHTEL is DENIED, and the complaint filed herein is DISMISSED.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).